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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 JANE DOE

4 Plaintiff

5 v.

13 CV 2802 (AKH)

6 1,2,3, UNITED STATES OF
7 AMERICA, LT. GEN. FRANKLIN LEE
8 HAGENBECK, BRIG. GEN. WILLIAM
9 E. RAPP,

Defendants

-----x

10 New York, N.Y.
11 December 16, 2013
12 3:00 p.m.

Before:

13 HON. ALVIN K. HELLERSTEIN

14 District Judge

15 APPEARANCES

16 JEROME N. FRANK LEGAL SERVICES ORGANIZATION
Attorneys for Plaintiff

17 MICHAEL WISHNIE
18 CHELSEA KELLY
19 JESSICA MARSDEN
LISA WANG
MARGARET MIDDLETON

20 UNITED STATES ATTORNEYS OFFICE
21 SOUTHERN DISTRICT OF NEW YORK
Attorney for Defendant
22 CHRISTOPHER CONNOLLY
23
24
25

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1 (In open court; case called)

2 THE COURT: We have some preliminary matters to take
3 care of in the Houston case. So I have signed the orders
4 admitting students to argue, and I will file that. Margaret
5 Middleton?

6 MS. MIDDLETON: Yes, your Honor.

7 THE COURT: Are you Ms. Middleton?

8 MS. MIDDLETON: I am.

9 THE COURT: You would like to be a member of this
10 Court. You have an outstanding record. You clerked for Janet
11 Hall, my colleague, who is a wonderful lady and a wonderful
12 wife and mother, and a wonderful judge. You must have had an
13 extraordinary time.

14 MS. MIDDLETON: I did, your Honor.

15 THE COURT: Give her my regards.

16 MS. MIDDLETON: I will.

17 THE COURT: You are being proposed by --

18 MS. MIDDLETON: Professor Wishnie.

19 THE COURT: Mr. Wishnie, how are you?

20 MR. WISHNIE: I'm fine. How are you, Judge?

21 THE COURT: You vouch for Ms. Middleton?

22 MR. WISHNIE: I do, your Honor.

23 THE COURT: You think she is an extraordinary person?

24 MR. WISHNIE: Very much so.

25 THE COURT: All right.

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1 Take the oath of office.

2 I, state your name.

3 MS. MIDDLETON: I, Margaret Middleton.

4 THE COURT: Do solemnly swear or affirm.

5 MS. MIDDLETON: Do solemnly swear or affirm.

6 THE COURT: Which one?

7 MS. MIDDLETON: I'm going to affirm, your Honor.

8 THE COURT: Do solemnly affirm as an attorney or
9 counselor of this court.

10 MS. MIDDLETON: Do solemnly affirm as an attorney or
11 counselor of this court.

12 THE COURT: That I will conduct myself.

13 MS. MIDDLETON: That I will conduct myself.

14 THE COURT: Uprightly and according to the law.

15 MS. MIDDLETON: Uprightly and according to the law.

16 THE COURT: And I will support and defend the
17 Constitution of the United States.

18 MS. MIDDLETON: And I will support and defend the
19 Constitution of the United States.

20 THE COURT: I am going to return this back to you.
21 You will sign it, and I will sign it, and you will be admitted
22 upon your payment of the fee to the clerk. You don't have to
23 worry about that now. you can argue.

24 MS. MIDDLETON: I signed it, but --

25 THE COURT: You have given your credentials to the

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1 clerk's office.

2 MS. MIDDLETON: Your Honor, they said that they
3 couldn't process it until you had signed it because I didn't
4 have a certificate from the State of New York.

5 THE COURT: OK.

6 MS. MIDDLETON: Thank you, your Honor.

7 THE COURT: You're welcome.

8 Any other preliminaries?

9 MR. WISHNIE: Nothing from us, your Honor.

10 THE COURT: Call the case. Jane Doe is represented by
11 Michael Wishnie.

12 MR. WISHNIE: Yes, your Honor.

13 THE COURT: Chelma Kelly.

14 MR. WISHNIE: That's Chelsea Kelly, your Honor.

15 THE COURT: Chelma?

16 MS. KELLY: Chelsea Kelly.

17 THE COURT: Ms. Kelly. And Jessica Marsden.

18 MS. MARSDEN: Yes, your Honor.

19 THE COURT: Of the Jerome N. Frank Legal Services
20 Organization.

21 And the United States is represented by Christopher
22 Connolly.

23 MR. CONNOLLY: Yes. Good afternoon, your Honor.

24 THE COURT: Without colleagues?

25 MR. CONNOLLY: Yes, your Honor.

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1 THE COURT: Naked, as it were.

2 And Lisa Wang and Margaret Middleton, as it were.

3 MS. MIDDLETON: Yes, your Honor.

4 THE COURT: So, just another preliminary. I have been
5 thinking more about this. If the motion is granted, the case
6 is over, I am not going to change the status of the Jane Doe
7 quality of the case. But if I deny the motion, and the case
8 goes on, I do think it is important that the public be aware of
9 all that is going on and whatever artificialities that might be
10 introduced because of the Jane Doe plaintiff could possibly
11 complicate the case, probably would complicate the case.

12 I feel quite strongly that the case should be entirely
13 in the public view. If you disagree with that, Mr. Wishnie,
14 you are going to have to make a motion, and then I would write
15 something. But I do think there has been publicity to this in
16 the past; that we are not really hiding anything; and that to
17 the extent we are, or people think we are, it takes away from
18 the case.

19 So that's my view, and I wanted you to know it.

20 MR. WISHNIE: Thank you, your Honor. Of course we
21 very much do hope the case goes forward; and if it does, we
22 will consult with our client. And if she so directs, we will
23 make the appropriate motion.

24 THE COURT: I will tell you what, a week -- if I deny
25 the motion, it may not happen today, but a week after I -- if I

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1 deny the motion, a week after that denial, I would like a
2 letter from you telling me what you think, if you would like to
3 brief the issues any more, you can ask me for some time to do
4 that, and I will give it to you.

5 MR. WISHNIE: Thank you, your Honor.

6 THE COURT: All right. It's the government motion.
7 So, Mr. Connolly, I'm ready to hear you.

8 MR. CONNOLLY: Thank you, your Honor. Good afternoon.

9 As set forth in the government's briefs in this
10 matter --

11 THE COURT: Why don't you take the podium? It would
12 be easier to hear you.

13 MR. CONNOLLY: Certainly.

14 As set forth in the government's briefs in this
15 matter, plaintiffs amended complaint should be dismissed in its
16 entirety. In this lawsuit, plaintiff is challenging the
17 policies and procedures of the Department of Defense with
18 respect to the training, investigation and punishment of sexual
19 assault. Clear and unbroken Supreme Court precedent, the Feres
20 doctrine, precludes these types of claims under both the
21 Federal Tort Claims Act and under Bivens.

22 Plaintiffs attempt to style her claims as a contract
23 claim pursuant to the Little Tucker Act, also fails.

24 THE COURT: I'll tell you where I would like you to
25 focus.

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1 MR. CONNOLLY: Certainly, your Honor.

2 THE COURT: Equal protection. Can there be one law
3 and one set of procedures for men, and another law and another
4 set of procedures for women, and whether or not the Feres
5 doctrine controls all aspects of that kind of punishment.

6 MR. CONNOLLY: Yes, your Honor.

7 THE COURT: Let me give you my preliminary views to
8 make it easier for you to argue.

9 I think when you talk about the dignity of an
10 individual in the military and what might be considered stern,
11 even arbitrary conduct on the part of superiors, you are coming
12 into a place where the disciplinary methods and procedures of
13 the military chain of command come into play. And both
14 experience and the law instructs judges to stay away for
15 constitutional reasons and for important policy reasons.

16 The growth of the equal protection clause as it
17 relates to women is of more recent vintage. It's not been well
18 defined, I submit, in the context of the military. It lends
19 itself to examination and perhaps judicial examination.

20 And simply as I put it, can there be one law and one
21 set of policies governing men and a different law and different
22 set of policies regarding women without an articulable basis to
23 distinguish between them.

24 MR. CONNOLLY: Your Honor, I think to pull back and
25 place that within the context of Feres and the case law on

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1 Feres, with respect to plaintiff's Bivens claims on equal
2 protection or any of the other Bivens issues that she raises,
3 to allow those claims to go forward would be to call into
4 question the military decision-making with respect to
5 Department of Defense policies concerning prevention,
6 investigation, and punishment of sexual assault.

7 So, while your Honor may be correct that there are
8 equal protection issues of interest raised by this type of
9 claim, those claims are nonetheless precisely the types of
10 claims that are barred by Feres and its progeny.

11 THE COURT: Suppose the commandant of West Point
12 issued a rule that women have to clean men's rooms and men's
13 bathrooms and women's rooms and bathrooms as well. Men are not
14 naturally inclined to do that kind of work. It's domestic work
15 and there is no such rule requiring men to do it. Would that
16 be a lawful rule?

17 MR. CONNOLLY: That would be a rule that could not be
18 challenged through a Bivens action of the type that we have
19 here.

20 THE COURT: So, without a remedy, there is no right.

21 MR. CONNOLLY: There would be not a --

22 THE COURT: What would be the remedy?

23 MR. CONNOLLY: There are military -- there is a
24 military chain of command, and I -- forgive me, your Honor, I
25 wouldn't know precisely in the scenario that your Honor sets

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1 forth what a cadet who feels aggrieved by that type of rule,
2 what remedy he or she would have, but those are precisely the
3 types of decision that are entrusted to the military
4 leadership, and, more importantly, that cannot be challenged
5 through a Bivens action.

6 THE COURT: I don't know what the chain of command up
7 above the commandant of West Point.

8 MR. CONNOLLY: Pardon me, your Honor?

9 THE COURT: I don't know what chain of command would
10 exist. I guess it would exist to the Secretary of Defense.

11 MR. CONNOLLY: My understanding, yes, is that beyond
12 the leadership at West Point would be the leadership of the
13 Department of Defense. But what the fair --

14 THE COURT: That would be the secretary?

15 MR. CONNOLLY: Pardon me, your Honor?

16 THE COURT: That would be the secretary.

17 MR. CONNOLLY: Yes, your Honor.

18 THE COURT: Or maybe the general of the Army or maybe
19 the Joint Chief; but that's not a command position. Certainly
20 the president. But nobody has done anything. Nobody does
21 anything. It exists and has existed. What do you say?

22 MR. CONNOLLY: Pardon me, your Honor.

23 THE COURT: What's the remedy?

24 MR. CONNOLLY: Well, the policy could be challenged
25 through those military channels. If the policy was not changed

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1 as result of those challenges, I would hesitate to suggest any
2 other type of judicial remedy that might be available, but for
3 a cadet who feels aggrieved by those policies, Feres and the
4 line of Supreme Court cases and cases in this circuit that
5 follow from Feres teach that a Bivens claim or an FTCA claim
6 challenging that policy are challenges that are not available.

7 THE COURT: Leave out the FTCA. That would mean a
8 tort.

9 MR. CONNOLLY: Correct.

10 THE COURT: So, how could there be a situation where
11 the equal protection clause to the Constitution is violated and
12 there is no remedy.

13 MR. CONNOLLY: I'm not saying that there would be no
14 remedy, your Honor. The question is whether there would be a
15 Bivens remedy.

16 THE COURT: A judicial remedy.

17 MR. CONNOLLY: A judicial remedy, specifically a
18 Bivens remedy, and there would not be.

19 THE COURT: Bivens declares a judicial remedy.

20 MR. CONNOLLY: So long as what we're talking about is
21 an allegation of injury sustained incident to military service,
22 then the Feres bar would apply to a Bivens claim that
23 challenged that type of policy.

24 THE COURT: OK. That's your whole point? Thank you,
25 Mr. Connolly.

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1 MR. CONNOLLY: Thank you, your Honor. Would you like
2 me to continue or --

3 THE COURT: I'm not sure you have anything more to
4 say. I mean, I agree with you on the other aspects of the
5 Fifth Amendment, and I don't really see a Tucker Act claim
6 except that it's redundant of the Equal Protection argument. I
7 don't really see a Federal Tort Claims Act case, but I am
8 seriously bothered by the equal protection argument.

9 How could you have a situation -- and I'll take the
10 complaint as alleged to be true -- where cadets can go around
11 and could claim in cadence the degradation of the women? It's
12 kind of simple.

13 How could you have a situation where it's claimed that
14 over 50 percent of the women in military are raped? How could
15 you have a situation where it's alleged that a woman is
16 intimidated and in fear of lodging a complaint about a rape?

17 MR. CONNOLLY: I understand the nature of the
18 allegations that plaintiff is making here, and the disturbing
19 nature of some of those allegations, but for the purposes of
20 this lawsuit and for the purposes of her Bivens claim, which is
21 a claim that the individual defendants named here implemented
22 and oversaw deficient policies and procedures to address
23 precisely the types of issues that you're talking about, those
24 are precluded by Bivens -- excuse me -- by the Feres doctrine.
25 Those are the types of military decisions and the type of

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1 military decision-making that is entrusted to the military
2 establishment.

3 THE COURT: So the military establishment listened and
4 countenanced cadences like "I wish that all the ladies were
5 bricks in a pile, and if I were a mason, I'd lay them all in
6 style" or "I wish that all the ladies were holes in the road,
7 and I was a dump truck, I'd fill them with my load."

8 What is the message that is set by the commandant who
9 listens and knows of these cadences?

10 MR. CONNOLLY: That message that may be sent and the
11 actions that the commandant or other officials at West Point or
12 within the Department of Defense take with respect to these
13 types of allegations are properly within the military sphere.
14 And if a Bivens claim --

15 THE COURT: And they do nothing about it?

16 MR. CONNOLLY: A Bivens claim of the nature that the
17 plaintiff is bringing here, the injuries that she alleges from
18 the policies and procedures that were implemented is barred by
19 the Feres doctrine because it would require this Court to
20 second-guess military decisions and to, in effect, investigate
21 and look into precisely the type of military decision-making
22 that Feres and its progeny has said fall within --

23 THE COURT: Mr. Connolly, I disagree. I do not think
24 a judge ought to get involved in military decision-making, but
25 is it not proper for the judiciary to instruct the military

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1 that you are to prevent cadets from acting in such a way that
2 there is one law for women and another law for men?

3 MR. CONNOLLY: Respectfully, your Honor, under Feres
4 and the other cases that are cited in our brief, it would be
5 wrong for the Court to consider the appropriateness or
6 inappropriateness of the policies and procedures that the
7 Department of Defense has put in place to deal with the types
8 of sexual harassment and sexual assault claims that the
9 plaintiff raises in her amended complaint.

10 THE COURT: OK. I think we're repeating it. Let me
11 here what plaintiffs have to say.

12 MR. CONNOLLY: Thank you, your Honor.

13 MS. KELLY: Good afternoon, your Honor.

14 THE COURT: Good afternoon, Ms. Kelly.

15 MS. KELLY: I will be arguing the FTCA and Bivens
16 claims, and my colleague Jess Marsden, will be arguing the
17 Little Tucker Act claim.

18 Your Honor there, is an epidemic of sexual assault at
19 West Point. Because of the policies enacted by defendant,
20 countless students, including Jane Doe, have been raped,
21 assaulted or otherwise harassed while attending the academy.
22 If these assaults occurred at any other university in the
23 country, there would be no question as to the Court's
24 jurisdiction. But because West Point is a military academy--

25 THE COURT: I don't know. It has to be under color of

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1 law, otherwise I wouldn't have jurisdiction.

2 MS. KELLY: Your Honor, our point is that other
3 civilian universities have other remedies such as Title Nine.
4 However, West Point and other military academies do not have
5 such remedies, and, therefore, FTCA, Bivens and Little Tucker
6 Act are the only remedies that are available to our plaintiffs.

7 Your Honor, the main point that defendants rely upon
8 is the fact that courts are precluded from intruding upon the
9 military decision-making sphere, and we would like to point out
10 that in recent years, the Supreme Court has moved away from the
11 military discipline arguments.

12 We cite in our briefs *United States v. Stanley*, which
13 was decided after the *Shearer* case defendants cite. And in
14 *Stanley*, the court said that a test of reliability that depends
15 on the extent to which particular suits would call into
16 question military decision-making would itself require judicial
17 inquiry into military decision-making

18 THE COURT: Say that again.

19 MS. KELLY: A test for liability that depends on the
20 extent to which particular suits would call into question.

21 THE COURT: Particular what?

22 MS. KELLY: Particular suits, lawsuits, would call in
23 to question military decision-making would itself intrude upon
24 military decision-making.

25 THE COURT: Right. That's exactly Mr. Connolly's

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1 point.

2 MS. KELLY: Your Honor, the point is that the Supreme
3 Court believed that an incident to service test is a much more
4 objective and clear test for deciding liability with regard to
5 whether the Feres doctrine should apply, and not a test where
6 how much a case would or would not intrude upon military
7 decision-making.

8 THE COURT: Incident to service is harder for you than
9 intrusion upon military decision-making.

10 MS. KELLY: Pardon me, your Honor?

11 THE COURT: This case involving a rape in the basement
12 of a West Point building has very little to do with military
13 decision-making and a lot to do with incident disservice. I
14 think you are arguing a rule that is not very helpful to you.

15 MS. KELLY: Your Honor, we would agree with you that
16 it is much more relevant to the incident to service test than
17 it is --

18 THE COURT: So why bring it up to me?

19 MS. KELLY: We believe under both *Taber v. Maine* is a
20 Second Circuit case and *Wake v. The United States* --

21 THE COURT: What's the case?

22 MS. KELLY: *Taber v. Maine* is a Second Circuit case.
23 I can get the facts for you here, your Honor.

24 THE COURT: And the other case?

25 MS. KELLY: The other case is *Wake v. United States*.

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1 THE COURT: Go ahead.

2 MS. KELLY: Your Honor, under *Taber v. Maine*, service
3 members may recover under the FTCA when their injuries would
4 not be covered under workers' compensation law. Ms. Doe's
5 injuries would clearly not be covered under workers'
6 compensation law for two reasons. First of all, she was a
7 cadet of the academy; she was not an employee. Secondly, even
8 if she was an employee, which we submit to you she was not --

9 THE COURT: She's a member of the military.

10 MS. KELLY: Your Honor, we believe that there is a
11 large distinction between being a student at the military
12 academy and being an employee of the military. At the time of
13 the assault, Ms. Doe was only a sophomore at the academy, and
14 when you are a sophomore, if you are to leave the academy for
15 any reason, you are not required to repay the military for the
16 cost of your education, whereas when you are a junior at the
17 academy, you are required to repay.

18 THE COURT: She was subject to military discipline.
19 She was subject to the orders of upper classmen and others who
20 are in a superior position of her. I can't see that
21 distinction. I know it's drawn, but it seems to me a false
22 one.

23 MS. KELLY: Your Honor, we would point you towards New
24 York Workers' Compensation laws which look at a variety of
25 factors as to whether an employer and employee relationship --

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1 THE COURT: That has to do all with the Federal Tort
2 Claims Act which I think as enacted there is no causation to
3 show that -- I am interested in equal protection. Give me
4 argument based on equal protection.

5 MS. KELLY: Well, your Honor, we certainly agree with
6 the points that you made on equal protection that the policies
7 created by defendants clearly distinguish between female and
8 male cadets. They put female cadets at a very high risk of
9 sexual assault and sexual harassment, and they clearly fostered
10 and created an environment that was misogynistic and views with
11 sexual aggression which made it very difficult for female
12 cadets to complete their education at West Point.

13 THE COURT: Suppose the commandant said, "You know, I
14 want these policies. They show toughness. They show
15 aggressiveness. Maybe these are male characteristics, but I
16 want these characteristics of all my cadets." Let's say he was
17 mistaken, but that's his rationale. Should the courts say
18 that's a phony rationale? That's an impermissible rationale?
19 It's an impermissible rule?

20 MS. KELLY: Yes, your Honor. I don't believe there
21 could be any rationale that is predicated upon causing the
22 Constitution violation of an individual. It is clear and
23 established that a sexual assault does constitute a deprivation
24 of due process within the circuit. And a policy that increases
25 the risks that female cadets face of experiencing sexual

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1 assault is clearly in violation of equal protection.

2 THE COURT: Tell me about Feres.

3 MS. KELLY: Sure, your Honor. We believe that the
4 most informative case on this point is *Taber v. Maine*.

5 THE COURT: That's a Second Circuit. Stay with Feres.
6 Feres is United States Supreme Court. What happened in that
7 case?

8 MS. KELLY: So, in the Feres case, there were several
9 plaintiffs, and essentially they sued under the Federal Tort
10 Claims Act for injuries that they had incurred during their
11 service. The Supreme Court went through and --

12 THE COURT: How did they get the injuries?

13 MS. KELLY: Your Honor, I would have to double-check
14 on the exact nature of the injuries, but I know that it was
15 throughout the course of their service in the military. The
16 main distinction that --

17 THE COURT: It was incident to their service?

18 MS. KELLY: It was incident to their service, yes.
19 Your Honor, the main distinction that the court makes is that
20 they looked at *Brooks v. The United States* which was a case
21 that the Supreme Court decided earlier, and they determined
22 that *Brooks v. The United States* was not going to be overruled
23 because in that case the injuries that gave rise to
24 plaintiff's -- excuse me -- the experiences that gave rise to
25 plaintiff's injuries were not incident to service in those

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1 cases, but they drew the distinction between Brooks and Feres.

2 But the main point in the Feres case is that in
3 deciding not to overrule Brooks, the Supreme Court basically
4 made the law so that Feres is not a blanket ban on all cases
5 brought by military service members against the military, and
6 that is something that the government has sought to persuade
7 courts that it is, which it is not.

8 THE COURT: I don't understand.

9 MS. KELLY: In other words, your Honor, for years the
10 government has sought to use Feres as a bar on all cases
11 brought by military service members against the military when
12 that is not what the language of the Feres doctrine says.

13 THE COURT: So, when a liberal commentator like Erwin
14 Shemerinski says there is no law or ability to sue under
15 Bivens, he's wrong.

16 MS. KELLY: There is no longer an ability for a
17 service member to sue under --

18 THE COURT: That is correct.

19 MS. KELLY: Yes. I believe he is incorrect, your
20 Honor. That is not what the Feres doctrine says. The Feres
21 doctrine makes it very clear that it is only injuries that are
22 incident to service that are barred by the Feres doctrine.

23 THE COURT: How can you say this is not incident to
24 service? She got her injury at West Point. She was at a
25 building at West Point. She was tired taking examinations that

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1 were required of an under classman at West Point. She was
2 allegedly raped by another cadet.

3 MS. KELLY: Your Honor, the Feres doctrine looks at
4 whether the activity which gave rise to the assault was
5 incident to service or in furtherance of military objectives.

6 At the time of Ms. Doe's assault, she had left her
7 dormitory with a classmate. She was not doing anything in
8 furtherance of military objective. She was not participating
9 in a military operation or a training. She was clearly
10 enjoying recreational activities. And when the assault
11 occurred, she was clearly not doing anything that was in
12 furtherance of military objectives.

13 THE COURT: Is a recreational activity on a base
14 incident to service?

15 MS. KELLY: Not necessarily, your Honor. We cite two
16 cases: One by the Fifth Circuit and one by the Ninth Circuit,
17 in which both of those plaintiffs were engaging in recreational
18 activity that was on a military base. When they were injured,
19 they were able to sue under the FTCA without a Feres bar.

20 THE COURT: What kinds of injuries were they? What
21 were the activities?

22 MS. KELLY: In *Regan v. Starcraft Marine*, your Honor,
23 which is the Ninth Circuit case -- excuse me -- a Fifth Circuit
24 case, a military service member was on informal leave and at a
25 military recreational facility, and he was physically boating

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1 with a friend and enjoying some alcoholic beverages, and there
2 was a some kind of a malfunction on the boat, and he was
3 injured gravely.

4 THE COURT: That doesn't really strike me.

5 MS. KELLY: Your Honor, in *Dreyer v. The United*
6 *States*, which is a Ninth Circuit case, a soldier fell into a
7 drainage channel which was located on his base and he was also
8 injured, and at that moment he was off duty and enjoying
9 recreational activity, and the court deemed that he was not
10 barred by *Feres*.

11 THE COURT: Was he under military discipline?

12 MS. KELLY: Yes. Both plaintiffs were subject to
13 military discipline.

14 THE COURT: So, Justice Jackson writes in *Feres*: A
15 common fact underlying the three cases is that each claimant
16 while on active duty, and not on furlough, sustained injury due
17 to negligence of others in the armed forces."

18 That's this case. Plaintiff was on active duty as a
19 cadet in West Point. Neither she nor her rapist were on
20 furlough. She sustained injury due not to negligence but to
21 the fault of others in the armed forces. It's *Feres*.

22 MS. KELLY: Your Honor, I am not sure it's necessarily
23 true that she was on active duty at the time. The assault
24 occurred on a Saturday evening when she was on recreational --

25 THE COURT: Soldiers are on active duty seven days a

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1 week. She's a cadet. She can't leave the base except with
2 permission. She is always subject to military discipline while
3 she's on the base and sometimes off the base.

4 MS. KELLY: The Second Circuit that most closely goes
5 into all of the incident to service test factors is *Wake v. The*
6 *United States*. And that is a 2002 case. We believe that
7 under -- basically, all the circuits have developed their own
8 kind of analysis of the incident to service test, and under the
9 Wake factors established by the Second Circuit, we believe that
10 Ms. Doe's case is not incident to service.

11 THE COURT: What were the facts of Wake?

12 MS. KELLY: The fact of Wake was that Karen Wake was
13 an ROTC cadet, and she was riding in a military vehicle on the
14 way to a pre-commissioning physical at a military hospital, and
15 on the way to the physical, she got into a car accident and was
16 severely injured. The Court ruled that Feres did apply in that
17 case because she was engaged in an activity that was related to
18 the military and she was enjoying a benefit that was conferred
19 by her military service.

20 THE COURT: Well, doesn't that really apply to the
21 plaintiff here?

22 MS. KELLY: No. I believe that our case is very
23 distinguishable from the Wake case in that Karen Wake, as I
24 mentioned, she was riding in a military vehicle. She was on
25 her way to a pre-commissioning physical, as opposed to the

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1 facts of our case, in which Ms. Doe was not engaged in any
2 activity that was related to the objectives of the military.

3 THE COURT: She was taking exams. It was exam week at
4 West Point.

5 MS. KELLY: Your Honor, she was clearly breaking many
6 West Point rules at the time of the assault. She left her
7 dormitory after Taps, which is the curfew. She was drinking
8 alcohol, which was clearly prohibited by West Point.

9 THE COURT: After an Ambien.

10 MS. KELLY: Excuse me?

11 THE COURT: After she took an Ambien.

12 MS. KELLY: That's correct, your Honor. Clearly, none
13 of those things are in furtherance of military objectives at
14 the time.

15 THE COURT: That's not the case.

16 MS. KELLY: Well, that is the text, your Honor, in the
17 sense that it is incident to military service, it is something
18 that derives -- the text incident to military service --

19 THE COURT: She was in the week of tests. West Point
20 is very serious about its tests and the academic standing of
21 its cadets. You cannot say that she was not involved in a
22 service-related activity. You cannot say that she was looking
23 to derive a military benefit from performance on the tests.
24 You cannot say she was not subject to military discipline. You
25 cannot say she was off the base. None of these things exist.

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1 Why isn't Feres the doctrine, it's United States
2 Supreme Court. Don't tell me about Second Circuit, even though
3 the judges want me to follow what they do. It's United States
4 Supreme Court, Feres.

5 MS. KELLY: Of course, your Honor.

6 THE COURT: How do I get around it if I want to rule
7 for you? How do I get around Feres?

8 MS. KELLY: Your Honor, under the test that you
9 yourself state, there is no way any military service member
10 could ever bring suit under the FTCA.

11 THE COURT: Precisely. That's what Mr. Connolly says.

12 MS. KELLY: Your Honor, that's clearly not what was
13 intended by the Supreme when they wrote the Feres opinion.

14 THE COURT: Why not?

15 MS. KELLY: They clearly did not overrule *Brooks v.*
16 *United States*, which was a case that came before, and that
17 case, the facts of the case were that the attack that
18 Mr. Brooks suffered was not incident to military service. By
19 choosing not to overrule Brooks, the Supreme Court made it very
20 clear that their intent was not to bar all suits against the
21 military by service members, but, rather to create a test that
22 looks very much like a federal and state workers' compensation
23 test. And we believe that that is why --

24 THE COURT: Justice Jackson distinguished Brooks,
25 didn't he?

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1 MS. KELLY: Yes, on the basis of the fact that Brooks
2 was not incident to service.

3 THE COURT: Not incident to service.

4 MS. KELLY: That's correct. And Feres was incident to
5 service.

6 THE COURT: That's a big difference.

7 MS. KELLY: Yes, but the whole question is what does
8 incident to service mean? That is what all of these cases turn
9 upon, and that is what we believe this case in addition turns
10 upon.

11 THE COURT: Justice Jackson writes: The actual
12 holding in the Brooks case can support liability here; that is,
13 in Feres, only by ignoring the vital distinction therein
14 stated. The injury to Brooks did not arise out of or in the
15 course of military duty. Brooks was on furlough, driving on
16 the highway, under compulsion of no orders or duty. He had no
17 military mission. A government owned and operated vehicle
18 collided with him. Brooks's father, riding in the same car,
19 recovered for his injuries, and the government did not further
20 contest the judgment but contended that there could be no
21 liability to the sons solely because the sons were in the Army.

22 The Court rejected the contention primarily because
23 Brooks' relationship while on leave was not analogous to that
24 of a soldier injured while performing duties under the rulings.
25 Brooks is not this case.

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1 MS. KELLY: Certainly, your Honor, the Supreme Court
2 did not mean to only bar cases that --

3 THE COURT: Ms. Kelly, how do I get out of the force
4 of Feres?

5 MS. KELLY: Your Honor, we --

6 THE COURT: That is your challenge.

7 MS. KELLY: We believe that *Taber v. Maine*, once
8 again, is the seminal case on this point. We believe that it
9 does give a very thorough legal explication of what Feres was
10 intended to do.

11 Essentially what *Taber v. Maine*, the Second Circuit
12 case does, is it goes back and looks at the language of the
13 FTCA, Congress's intent and then the language of the Feres
14 doctrine when the Supreme Court decided the case. In *Taber*
15 *v. Maine*, the Second Circuit stated that the text of Feres
16 derives from federal and state workers' compensation law. The
17 scope of employment test is essentially the same as an incident
18 to service test. Therefore, the test should be whether or not
19 an employee's injury would be covered by workers' compensation
20 law. We believe in this case it is very clear that Ms. Doe's
21 injuries would not be covered by workers' compensation law; and
22 that if the military had an analogue to workers' compensation
23 law, they clearly would not have to pay for Ms. Doe's injuries
24 under that analogue.

25 THE COURT: These are the facts of *Taber*, an opinion

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1 by Judge Calabrisi falls back on an opinion in 1968 of the
2 celebrated Judge Henry Furman. Robert S. Maine, a Navy
3 serviceman on active duty in the U.S. Naval ship repair
4 facility in Guam went on liberty after having completed a
5 grueling 24-hour-duty shift. While on liberty, he was free to
6 leave the base as he pleased and travel up to 50 miles away.
7 He could be recalled for duty at any time.

8 Then he decided to have a good time. By noon he was
9 relaxing at an on-base beach party and drinking beer with Navy
10 friends. Later that afternoon, he purchased two six packs of
11 beer at the base PX with his Navy comrade and returned with her
12 to his barracks to drink several more cans.

13 At dinner time, Maine accompanied friends to the
14 enlisted men's club where he consumed two cocktails with his
15 meal. After dinner, he attended a barracks party in the room
16 of a superior officer with several other superior officers
17 present. There Main drank three or four more beers. When he
18 returned to left to his own barracks at about 11:00 p.m., two
19 others noticed that he was drunk.

20 At 11:30 p.m. Maine had difficulty sleeping and
21 decided to drive off base to get something to eat. Feeling
22 tired, he aborted his snack mission and tried to return to
23 base. On the way back, he caused the accident that injured
24 Taber. Taber

25 was an enlisted seabee, a construction worker in the

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1 United States Navy and was stationed at Camp Covington, Guam.
2 He was also on liberty under the same freedom to travel off
3 base.

4 Around 2:00 p.m. on Saturday, Taber and a girlfriend,
5 planning to spend the weekend together off base, had dinner,
6 drinks and other kinds of activities.

7 At midnight, shortly before they left the house where
8 they were, as fate would have it, they never got there. While
9 they were driving on the public roadway toward their
10 designation, Maine crashed into them injuring Taber severely.
11 That was the Federal Tort Claims Act based on a driving
12 accident while both men were at liberty off base.

13 Judge Calabrisi held that under the doctrine of
14 respondeat superior, the United States was liable under the
15 Tort Claims Act.

16 MS. KELLY: Your Honor, what we believe is so
17 significant about Taber is not necessarily the facts of the
18 case and how they correlate to the facts of our case, but
19 rather the thorough explication of the Feres doctrine that
20 Judge Calabrisi goes into and the test that the Second Circuit
21 sets up regarding when to apply fairness related to FTCA
22 claims.

23 THE COURT: Forget Taber. You're not persuading me on
24 the basis of Taber.

25 MS. KELLY: Well, in that case, your Honor, I believe

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1 that the case you should focus on is *Wake v. The United States*,
2 which basically explores the incident to service test within
3 the Second Circuit. That was a 2002 case, the facts of which I
4 have gone into a little bit, the one about Karen Wake in a
5 military vehicle on the way to a pre-commissioning physical.

6 The test that the Second Circuit sets up in this case
7 looks at four factors in particular. Two of those factors are
8 whether the plaintiff was engaged in activity that was
9 unrelated to the military and which was or was not limited to
10 military personnel.

11 THE COURT: Who writes this? Judge Altimari: Wake
12 contends that the Feres doctrine does not apply to her claims
13 because as a member of the Naval ROTC and as an enlisted
14 inactive member of the Navy reserves, she lacked an official
15 military status at the time of the accident.

16 While this Court has never squarely addressed the
17 official status as ROTC member, a number of courts have found
18 that cadets in military academies may be barred by Feres from
19 bringing a tort claim if injured incident to military service
20 regardless of their official military status. And cites cases.

21 We agree, and conclude, that wake was acting in a
22 military capacity at the time of the accident, despite the fact
23 that her only official act of military affiliation at the time
24 was that as a member of the Naval ROTC.

25 Wake doesn't help you. Your Honor, we believe that

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1 the test that Wake sets up is very important; namely, that it
2 doesn't focus so much on the fact that she was a member of the
3 ROTC, but rather on the activity that she was engaged in at the
4 time of the assault. We believe this is very analogous to the
5 frolic and detour cases that we cite in our brief, which
6 harkens back to whether workers' compensation would apply to
7 the injury at hand.

8 We believe that the facts that we allege very clearly
9 establish that Ms. Doe was engaged in a frolic at the time of
10 the assault, and, therefore, would not be covered under
11 workers' compensation law, and that under the Taber test, she
12 therefore should not be barred by the Feres doctrine.

13 THE COURT: Anything else to tell me?

14 MS. KELLY: That is all from me, your Honor, but if
15 you would like, my colleague Jess Marsden can speak to the
16 Little Tucker Act claim.

17 MS. MARSDEN: Your Honor, I would like to try to
18 persuade you but the Little Tucker Act claim which Feres does
19 not bar should not be dismissed. I believe your Honor
20 suggested earlier that this claim may only be derivative of her
21 tort and Bivens claims. However, the Federal Circuit precedent
22 on this issue is clear that where there is a contractual
23 relationship between the U.S. and the plaintiff, even injuries
24 that might also sound in tort can nonetheless be brought
25 pursuant to this court's Little Tucker Act jurisdiction.

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1 THE COURT: What was the breach of contract?

2 MS. MARSDEN: The breach of contract was the breach of
3 the implied duty of good faith and fair dealing when the
4 government acted in bad faith, despite the full knowledge of
5 the epidemic of sexual assault that existed at West Point.

6 THE COURT: So every failed candidate in West Point
7 who flunks out will now bring a lawsuit.

8 MS. MARSDEN: No, your Honor. The duty of good faith
9 and fair dealing covers only a plaintiff's reasonable
10 expectations regarding the contract and also requires --

11 THE COURT: Everybody will allege that.

12 MS. MARSDEN: Certainly, your Honor, but we believe
13 that unlike the other potential future suits, Ms. Doe has
14 clearly established that the government did defeat her
15 reasonable expectations.

16 THE COURT: By what?

17 MS. MARSDEN: That she expected a safe educational
18 environment in which she could prepare pursuant to the contract
19 to serve on active duty for eight years.

20 THE COURT: Every one will claim that we had to march
21 too much and went through too much physical activity; we were
22 not allowed sickness; that the superior officer got in our way,
23 etc., etc. and every claim of a flunked-out person will come to
24 court. So we will now review the academic exertions of the
25 faculty. Is that what you want me to do?

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1 MS. MARSDEN: Your Honor, I don't believe such
2 plaintiffs would be able to allege that the head of West Point
3 acted in bad faith by implementing an aggressive physical
4 education program nor that they should not --

5 THE COURT: You don't have sufficient appreciation for
6 the imagination of lawyers.

7 MS. MARSDEN: Your Honor, even so, I believe that in
8 this case, Ms. Doe has pled sufficient facts to demonstrate bad
9 faith on the part of West Point's leaders.

10 THE COURT: So you want me to go right back into
11 Feres.

12 MS. MARSDEN: No, your Honor.

13 THE COURT: So I can examine this in a contract claim
14 but not in a constitutional claim. That's what you're saying.

15 MS. MARSDEN: Yes, your Honor. And, in fact, the
16 Supreme Court in 1980 in a case called --

17 THE COURT: A contract is more important than the
18 Constitution?

19 MS. MARSDEN: Pardon?

20 THE COURT: The right of contract is more important
21 than the constitutional rights of free speech, equal
22 protection.

23 MS. MARSDEN: Whichever of these claims is more
24 important, Feres has never been held to bar a Little Tucker Act
25 claim. So, to the extent Ms. Doe has available a contract

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1 remedy for her injuries, then this suit should be allowed to go
2 forward.

3 THE COURT: Thank you.

4 MS. MARSDEN: Your Honor, I have one more thing.

5 THE COURT: OK.

6 MS. MARSDEN: In reviewing the complaint in
7 preparation for this hearing, we noticed one error. In
8 paragraph 36, which makes reference to a DOD report, the
9 amended complaint states that 51 percent of female cadets
10 reported sexual assault, that should say sexual harassment.
11 The same report found that approximately 10 percent of female
12 cadets reported experiencing sexual assault. Thank you.

13 THE COURT: Thank you.

14 Anything more, Mr. Connolly?

15 MR. CONNOLLY: Your Honor, very briefly, if I may.

16 I wanted to briefly address one of the issues that you
17 raised when I was previously at the podium with respect to the
18 types of remedies that might be available to a cadet who
19 believes that he or she is injured by policies.

20 In light of the Feres doctrine, which, as we argue,
21 plainly bars FTCA and Givens claims of the type that plaintiff
22 has brought, on page 16 of our opening brief, we do actually
23 mention one of the types of remedies available. Article 138 of
24 the Uniform Code of Military Justice provides that a service
25 member who is aggrieved by her commander can complain up the

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1 chain of command and an investigation would be required. It
2 provides for redress for any instances in which a service
3 member feels wronged by the chain of command, and that includes
4 constitutional complaints.

5 Cadets can also complain to the inspector general, and
6 if they were retaliated against due to those complaints, they
7 also have further redress; for example, criminal prosecution
8 under the Whistleblower Protection Act.

9 Briefly, your Honor, as your Honor has stated
10 plainly--

11 THE COURT: Wouldn't that interfere with military
12 discipline, if there was such a complaint?

13 MR. CONNOLLY: To the inspector general? Well, if
14 there were retaliatory incidents, I suppose that there would be
15 some sort of an investigation on the part of the inspector
16 general. But, clearly, Article 138 of the Uniform Code of
17 Military Justice contemplates relief for a cadet through the
18 chain of command. And as the cases set forth in both of the
19 government's briefs make clear, FTCA and Bivens' remedies are
20 plainly not available. As your Honor has indicated, it's clear
21 that the plaintiff's injuries were sustained incident to
22 service. In that respect, I would point out that the injuries
23 that form the basis for her claims here are not the injuries
24 allegedly suffered as a result of the sexual assault, but,
25 rather, the injuries suffered as a result of the policies and

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1 procedures implemented by the leadership at West Point.

2 THE COURT: Yes. She alleges -- she is not suing her
3 rapist.

4 MR. CONNOLLY: Correct, your Honor.

5 THE COURT: She is suing the military leadership at
6 West Point, and she alleges that they created a sexually
7 harassing set of policies and programs to the extent that women
8 are subjected to a degrading and hostile environment that robs
9 them of their right to equal protection.

10 They are not saying that life was bananas and cream.
11 What they want is the same set of tough standards as applies to
12 the men -- no more; no less. And they allege that a set of
13 policies that degrades women; that exploits women; that
14 promotes sexually aggressive conduct to women, even by people
15 with whom they serve, takes away their right to equal
16 protection.

17 It's not stated, but it's implicit, that there cannot
18 be proper loyal service to the military if there is one law for
19 men and another law for women. Accomplishment of the mission
20 requires a coordination among all members and the mutual
21 respect within the chain of command. And if notwithstanding
22 excellent performance, competent dedication to the mission,
23 women can be exploited and degraded, their equal protection is
24 robbed. That's the sense of the allegations.

25 At this point in time, I have to accept as true

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1 everything alleged in the complaint and the fair inferences
2 that are raised by the allegations of the complaint. And this
3 is how I read the complaint. I have to ask if Feres was
4 intended to have that reach to immunize a commandant against
5 judicial review of clear constitutional violations. Women's
6 right to equal protection is well-founded in the Constitution.
7 It is the express ruling of Supreme Court decisions, and it has
8 to be respected and enforced as any law is. The fact that
9 there be internal means of redress, which according to the
10 experience alleged in the complaint was not effective and not
11 present, indicates that there is no remedy unless the Court is
12 willing to act.

13 I served three years in the United States Army in the
14 judge advocate corps. I considered this some of my most
15 meaningful years, and I very much believe in the mission of the
16 United States military forces to protect our country and to
17 protect our rights as citizens, but it cannot be done on the
18 backs of women. They are entitled to the same respect, the
19 same dignity and same equal rights as men. It is on this
20 setting I have to write.

21 Feres is a powerful case. It expresses an important
22 wisdom, which I respect and which I believe, but at the same
23 time it is the Constitution that we have to enforce, and that's
24 part of my job in this. Decision reserved.

25 Off the record.

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(Discussion off the record)

THE COURT: I was commenting on the record what would be the appellate rights of the parties. If I rule in favor of the government, the plaintiff clearly is the aggrieved party from the final decision or it would seem that way and has the right of appeal.

If I ruled by denying the motion, the government might have an appeal in relationship to immunities depending how I rule and depending on other circumstances.

In any event, it is not something I am prepared to make a ruling on right now. So I suggest that if my decision is such that the government wishes to appeal, that should be the basis of the separate motion brought after my decision.

Thank you very much.

(Adjourned)